

No. 78-67

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
and

BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

SUPPLEMENT TO BRIEF FOR THE
BOSTON UNIVERSITY CHAPTER,
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS
IN OPPOSITION

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We continue to be of the view that the decision below does not, by itself, present issues appropriate for review by this Court. However, the pending petitions for certiorari in this case and in *NLRB v. Yeshiva University*, No. 78-851, have placed respondent's bargaining rights under a continuing cloud of uncertainty. For that reason, we wish hereby to modify partially our position in opposition to the grant of certiorari in this case.

If the petition in *Yeshiva* is denied, or if it is granted and that decision is affirmed, an anomalous situation would result if the petition in this case is denied. Although the bargaining order in this case would impose on Boston University a continuing obligation, enforceable by contempt proceedings in the court of appeals, at *Yeshiva* and at other similar universities, especially those in the Second Circuit, no such obligation would be enforced. Moreover, in this event, it would remain open to Boston University to argue, in a variety of subsequent Board proceedings, that its faculty are managerial or supervisory employees, thereby very possibly defeating its obligation to bargain.

Furthermore, the decisions of the two courts of appeals are closely related and at least arguably in conflict. In *Yeshiva* the court of appeals decided that faculty members whose collective recommendations on matters of academic governance are normally accepted by the administration are, for that reason, supervisory or managerial employees not subject to the Board's jurisdiction, even though their recommendations are subject to review and final disposition by higher authority. In this case that issue was raised only indirectly. Petitioner argued below and now asks this Court to decide, in the second question presented in its Petition, that the Board should not have included department chairmen in the faculty bargaining unit. The Board included the chairmen on the theory that, in making recommendations on matters of academic governance, they acted primarily in the interest of the faculty. But obviously if the faculty's collective role in governance matters deprives them of employee status, then the chairmen's role in these matters, even if exercised in the interest of the faculty, renders them supervisory or managerial employees.

As stated, the issue decided in *Yeshiva* was not raised directly by Petitioner in the court below. But the Court

of Appeals for the First Circuit, in its acceptance of the Board's finding that chairmen at Boston University are not supervisors, necessarily affirmed the essential criteria on which the Board has relied to determine supervisory or managerial status in its higher education decisions—criteria which were rejected by the Second Circuit in the *Yeshiva* decision.

Accordingly, because the two cases are closely related in terms of the issues they present for this Court's disposition, and because their separate disposition could result in serious disparities in the administration of the National Labor Relations Act, disparities which should surely be avoided, *cf.*, *Commissioner v. Sunnen*, 333 U.S. 599 (1948), we suggest that the Court grant review in both cases, limiting the grant in this case to the "subsidiary question fairly comprised" (Rule 23(1)(c)) within the second question stated in the Petition for Certiorari, *viz.*, whether, assuming department chairmen exercise their authority in the interest of the faculty, they are nevertheless supervisory or managerial employees under the National Labor Relations Act. We further suggest that in the event review is granted the two cases be consolidated for argument.

Respectfully submitted,

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